

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF &
APPENDIX**

76-7504

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

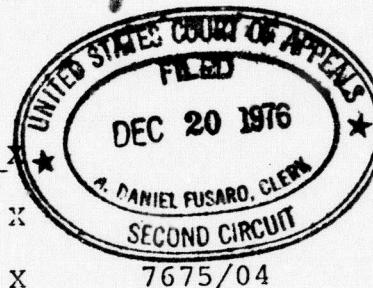
RICHARD A. FINKEL, minor by
LEONARD A. FINKEL

Plaintiff

vs.

N.Y.C. BOARD OF EDUCATION
ROBERT CHRISTEN, PRESIDENT

Defendants



BRIEF +

APPENDIX

LEONARD A. FINKEL, being duly sworn, deposes and says:

That I am the parent of minor petitioner RICHARD A. FINKEL and that I will present to the honorable court what in my opinion is a substantial issue which will have as its result, the issuance of an order to show cause and that the buses will run again for the minor petitioner and all those in like circumstance.

The case of Emanuel L. Roth Decision No. 8587 has no bearing on the case at hand because a high school student in the City of New York in both Public and Non-Public Schools does not receive contract school bus service and thus even this petitioner agrees that Emanuel L. Roth was wrong in his request. I have attached a copy of 3635 of the education law for New York State for your ready reference.

In June 1976, the Board of Education, City of New York cut the transportation budget by \$17,000,000 when it eliminated transportation for students who live closer than the State of New York reimbursable minimums and also Interborough and InterCounty transportation. The only students who received what I call intercommunity school board district busing were blacks and Hispanics in the

PAGINATION AS IN ORIGINAL COPY

free choice open enrollment program. One morning the board of education woke up and found that parents were refusing to pay bus fares and students were not going to public schools even though the distances were below the minimum for providing service. Now the City would lose state funding based on average daily attendance so they reinstated a half-fare arrangement on transit authority buses and private lines for both PUBLIC AND NON-PUBLIC STUDENTS in like circumstance.

The story cited above illustrates better than anything I could say the concept of like circumstance as applied to reduced fare or contract school busing. The corporation counsel seeks only to confuse the issue by coming to court with cases which have no application to the matter at hand.

Furthermore, the section of law No. 3635 abridges equal protection of law as guaranteed by the U.S. Constitution if RICHARD A. FINKEL lived in Rockland County he would even be transported to the State of New Jersey if that was the location of his denominational school and no school of his denomination were available locally as is the case with my son, RICHARD A. FINKEL. If he lived in a county of the State of New York other than the five boroughs of New York City or another City District, he would get service to denominational schools within a fifteen mile limit. For instance, Long Beach, New York provides contract school buses to Yeshiva Torah Vodaath, Ocean Parkway, Brooklyn, New York so this law No. 3635 discriminates against the city dweller because it was originally felt in a city district all schools were available at the community level this is not anymore the case in Richard's case as well as many others.

Mark Twain I.S. an integrated magnet school which provides schooling for educationally superior minority as well as white students brings together intellectually superior children for this selection process was the only way the board could attract white children to the Mark Twain I.S., so Richard is in like circumstance with the students in magnet public schools as he goes to a magnet non-public school, but Richard does not receive interdistrict bus service as does the students of Mark Twain I.S. so here too there is a violation of like circumstance provision of No. 3635.

Another example of like circumstance is that all children within the range of State reimbursable busing and who reside on Staten Island receive school bus service because of the inadequacy of the Transit Authority buses formerly many of these students received, as my son, Richard, does now, that being a reduced or free bus pass to Transit Authority buses because it was found that the Transit Authority could not provide service to the intra-community school board students contract school bus service was instituted. If the Transit Authority cannot provide service to intra-community school board No. 31 students and these students

exchanged their bus passes for free school bus service, how can the Board of Education exchange school bus service for a free pass for Transit Authority buses which would be even more inadequate for longer distance travel.

The last is another violation of like circumstance as why should one group of students living on Staten Island more than two miles from his or her school be treated differently than another namely intra vs. interborough students.

The Corporation Counsel would have you believe that when they cut out interborough busing, they saved many dollars. The net tax levy cost was at most during the running of the program, less than the cost of half of a teachers pay plus fringes for the transporting of 982 students because every bus used last year is being used this year and all the interborough students get FREE bus passes for which the Board of Education pays the Transit Authority and private bus lines \$180.00 per year (or approximately \$54,000.00) for each of the 300 students in interborough busing. So the difference in savings is less than \$10,000 in a total operating budget of \$2,000,000,000.00.

The absurdity is so great that one may ask how could it exist and how could anyone defend the action of discontinuing interborough busing especially where the students of Staten Island and Queens have no adequate bus service.

Let me state that the Mayor's representative on the Central Board of Education said it clearest.....Rabbi Finkel, your arguments are circular and without foundation just like my daughter who keeps a kosher home..... There exists a discrimination against RICHARD FINKEL and those in like circumstance. As the Supreme Court in Brown vs. Board of Education said separate but equal are inherently unequal so the setting up of new categories for transporting some but not all students in like circumstance, is a clear violation of Richard's civil rights. As their only reason for existence is to selectively circumvent No. 3635, a law which by itself discriminates against one class of student residing within New York State and not another.

Judge Neaher stated during the hearing that he could not tell the City of New York had to run its affairs and I agree to a point that being when the actions of the City fathers violate federal civil rights law as the recent case where the city council of a southern city could now be elected on a district not a city wide basis as was formerly the case.

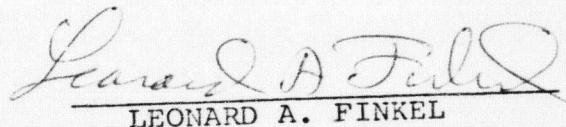
In conclusion, we have a law No. 3635 that discriminates against city vs. rural student with no current rational reason. The inadequacy of the Staten Island bus service points out the fact that the city cannot satisfy the legal requirements by granting a free bus pass as it is as useless to intra as well as inter-borough students. The fact that the nonpublic students go to magnet school in the non-public sector which is in like circumstance to public open enrollment free choice students. Furthermore, to point out the rural nature of Staten Island, the state legislature extended the red flashing light law to Staten Island as it applies in all parts of the state outside of the other four boroughs.

I believe that after you have examined the picture as a whole, you will ask yourself what is the real reason for the discontinuance of service is a discriminatory act against Jews primarily or against non-public school students as a whole. The reality of the case is as Chancellor Anker said at a forum, "the non-public school is the main attraction that keeps the middle class parents within the city limits". We are the group that pays the bulk of taxes so as we move from the city in the long run our taxes go with us.

So, on balance, the city will lose more money than it gains by stopping my son's bus as well as all others in like circumstance.

I do hereby affirm this is true and correct to the best of my knowledge and belief.

Submitted by


LEONARD A. FINKEL

Sworn to before me this
day of *Feb* , 1976.
15

Marie M. Gowen

MARIE MCGOWAN
COMMISSIONER OF DEEDS
CITY OF NEW YORK 5-239
Commission Expires November 1, 1977

Preiser maintained that

It's Old Math For Students: OK Half-Fares

By FRANK MAZZA

A total of 113,500 public school children, cut off from riding subways and buses at no fare or at reduced prices since last September, will be riding the transit system again under a half-fare program announced yesterday by the Metropolitan Transportation Authority.

The agency acted to reinstate the students at the urging of Mayor Beame, who had worked behind the scenes to get the authority and the Board of Education to go along with a compromise program. Under the adopted Beame plan, students living up to a mile and a half away from school may now be able to commute to classes for half-fare.

On Sept. 13, the Board of Education eliminated reduced fares for students living within 1.5 miles of a school and diverted the \$16.5 million fare-subsidy funds to enhance special education programs.

The education board has the option to use city subsidy funds as it sees fit, but the outcry from parents and local and state legislators forced the mayor to step in.

Under the plan, the MTA will pick up the losses from the half-fare program for the 113,500 students, but the administrative costs for issuing and collecting student fare passes will be borne by the Board of Education. The fare loss to the MTA is expected to be about \$10 million.

In a statement issued at City Hall, Beame said that he was "pleased" with the acceptance of his plan and suggested that the losses estimated by the MTA may be less than expected. He said that since September many of the cut-off students have been walking to school and that under the half-fare program

"many are expected to return and ride at half-fare."

What effect the reinstatement of reduced fares for students will have on the over-all budget of the Transit Authority is unknown.

A Board of Education spokesman was unable to say when reinstatement of the reduced-fare program would be put into effect. He explained that representatives of the board and the Transit Authority have to work out administrative details before a starting date could be determined.

Staten Island Advance

Vol. 91, No. 18,339 76 Pages 10 Cents

Staten Island, N.Y. Wednesday, October 27, 1976

Home-delivered daily and Sunday, 75 cents a week

T.A. OKs student fare cut; problems remain

By LAURA E. GUARINO

An agreement worked out between the Transit Authority and the Board of Education at the urging of more than 50 state and city legislators will enable 113,600 public and parochial school students throughout the city to ride for half-fare to and from school.

The change will affect those students who were previously eligible for reduced fare privileges and whose status was revoked last month as part of the Board of Education's new transportation policy approved in August.

On Staten Island, more than 23,000 students in both public and parochial schools were affected by the original policy change; however, information as to the number of those students whose privileges will be reinstated was not immediately available.

District 31 officials estimate that more than 500 elementary school students will be eligible for the reduced fare. In addition, it is possible that up to 10,000 high school students will also be eligible.

The changes are:

④ Pupils in kindergarten through sec-

ond grade who live less than a half-mile from school will be eligible to ride for half fare.

④ Students in grades three through six living less than a mile from school will be eligible.

④ High school students living between a mile and a mile and one half from school will also have the reduced fare privilege.

Students will pay 25 cents a trip.

However, before the change becomes effective there are a number of problems to be worked out.

According to Arthur Temple, director

of the Bureau of Pupil Transportation, the problem as to which agency will administer the program has not yet been settled. The central board is hoping the T.A. will take the responsibility for implementation, while the T.A. announced that the board would be in charge.

Temple said that there had been no decision concerning the possible distribution of passes to eligible pupils. He indicated that the printing, packaging and distribution of passes would be very expensive and would take "several months" to accomplish.

If another form of identification can

be found, such as the use of high school I.D. cards, it is possible that the changes could go into effect within a few days.

Queens Assemblyman Leonard Stavisky, who led the contingent of protesting lawmakers, called the agreement a "major breakthrough" in guaranteeing the safety of school children.

He pointed out that since the implementation of the policy in September which eliminated a large number of students from any transportation privileges, many parents were concerned for the safety of their children walking to

school.

On Staten Island, parents argued that the lack of sidewalks, the wooded and swampy areas and the condition of streets made even a short walk to school a danger. They also pointed out that the costs imposed on a family for full-fare transportation were prohibitive.

Some parents threatened to take their children out of school if some changes were not made.

This last point, Stavisky pointed out,

(Continued on Page 5)

T.A. agrees on half fares for students

(From Page 1)

was a major concern. In past statements, Stavisky noted that children forced to stay home from school during inclement weather because there was no affordable means of transportation would actually cost the city money. Any long-term absenteeism results in a reduction in state aid funds, which are allocated on the basis of average daily attendance.

Stavisky also contends that "this is only a first step." Further meetings are planned with T.A. and Board of Education officials, he said, in an attempt to work out further agreements to decrease the cost of each ride for all students, if possible. "The city and the board should each make a contribution" toward this goal, he said.

Mrs. Catherine Cass, chairman of the Community School board's transportation committee, was taken aback by news of the concession and would only comment: "If this is doing anything at all for the kids, I'm thrilled."

Other district officials did not seem quite so elated. Christy Cugini, deputy superintendent, said the number of children affected was "less significant than it would seem." He pointed out that the 500 children who would have reduced fare privileges returned are only a small percentage of the students in the district (40,000) and only a part of those affected by the Board of Education's policy change (more than 5,000).

The transportation policy change which the board implemented in September included not only changes in distance eligibility but also an increase in the cost of reduced fare transportation for those students still eligible.

PART III—TRANSPORTATION

§ 3635. Transportation

1. Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children. Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of ten miles, the distances in each case being measured by the nearest available route from home to school. The cost of providing such transportation between two or three miles, as the case may be, and ten miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district. Transportation for a lesser distance than two miles in the case of children attending grades kindergarten through eight or three miles in the case of children attending grades nine through twelve and for a greater distance

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§ 3635

EDUCATION LAW

Title 5

than ten miles may be provided by the district, and, if provided, shall be offered equally to all children in like circumstances residing in the district. The foregoing provisions of this subdivision shall not require transportation to be provided for children residing within a city school district, but if provided by such district pursuant to other provisions of this chapter, such transportation shall be offered equally to all such children in like circumstances. Nothing contained in this subdivision, however, shall be deemed to require a school district (i) to furnish transportation to a child direct to or from his home, or (ii) in the case of a child attending a parochial school of his denomination, to furnish transportation except to or from the nearest available parochial school of such denomination.

2. A parent or guardian of a child residing in any school district, or any representative authorized by such parent or guardian, who desires for a child during the next school year any transportation authorized or directed by this chapter shall submit a written request therefor to the school trustees or board of education of such district not later than the first day of April preceding the next school year, provided, however, that a parent or guardian of a child not residing in the district on such date shall submit a written request within thirty days after establishing residence in the district but in no event later than the first day of August. If the voters, school trustees, or board of education fail to provide the transportation authorized or directed by this chapter after receiving such a request, such parent, guardian or representative, or any taxpayer residing in the district, may appeal to the commissioner of education, as provided in section three hundred ten of this chapter. Except as hereinbefore provided, the commissioner of education shall not require that such parent, guardian or representative present a request for such transportation to any meeting of the voters, school trustees or board of education in order to appeal. Upon such appeal, the commissioner of education shall make such order as is required to effect compliance with the provisions of this chapter and this section.

3. Every contract for transportation of school children shall be in writing, and before such contract is executed the same shall be submitted for approval to the superintendent of schools having jurisdiction over said district and such contract shall not become effective until approved by such superintendent who shall first investigate the same with particular reference to the type of conveyance, the character and ability of the driver, the routes over which the conveyance shall travel, the time schedule, and such other matters as in the judgment of the superintendent are

Art. 73

TRANSPORTATION

§ 3635

necessary for the comfort and protection of the children while being transported to and from school. Every such contract for transportation of children shall contain an agreement upon the part of the contractor that the vehicle shall come to a full stop before crossing the track or tracks of any railroad and before crossing any state highway. A copy of such contract duly certified by the trustee or trustees or clerk of the board of education of the district and approved by the superintendent shall be filed with the education department within thirty days after its execution.

4. No transportation quota or other public moneys shall be apportioned and paid as provided in this chapter to any district furnishing transportation for pupils until the contract for transportation shall also have been approved by the commissioner of education. In defraying any expense incurred in providing transportation of any pupils or children under any provision of this chapter, public moneys apportioned to the district in which such pupils or children reside may be used therefor.

5. For the purpose of affording the greatest possible protection to school children, drive-off places on public highways may be designated by the appropriate board of education or district superintendent to permit school busses to be driven off the highway to receive or discharge school children, and the state or municipality having jurisdiction of such highway, is authorized to provide construction and maintenance of such designated drive-offs.

1947, c. 820; amended L.1951, c. 609; L.1960, c. 1074; L.1961, c. 950, eff. Sept. 1, 1961.

Repeal of section

Section is repealed effective July 1, 1971, by L.1970, c. 122, § 18. See Article 73-A, §§ J620-3626, post, eff. July 1, 1971.

Historical Note

Subd. 1 amended L.1900, c. 1074, eff. Sept. 1, 1901; L.1901, c. 950, § 1, eff. Sept. 1, 1901; L.1901, among other changes, inserted sentence beginning "The cost of providing" and added sentences beginning "The foregoing provisions" and "Nothing contained in".

Subd. 2 amended L.1900, c. 1074, eff. Sept. 1, 1901; L.1901, c. 950, § 1, eff. Sept. 1, 1901; L.1901, among other changes, inserted sentence beginning "A parent or guardian".

Subd. 3 added L.1951, c. 609, eff. April 6, 1951.

Derivation: Education Law of 1910, § 503, added L.1910, c. 405, § 5. Provisions similar to those of subds. 2 and 3 were contained in Education Law of 1910, § 206, subd. 18, repealed L.1939, c. 405, § 3.

Note of Commission on 1947 Revision.—Section revised; former § 503; section reference renumbered.

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FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.

SEP 9 1976

TIME 11:45 A.M. 76-C-1584
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-x

RICHARD A. FINKEL/minor by
LEONARD A. FINKEL/parent,

:

TIME 11:45 A.M. 76-C-1584
P.M.

Plaintiff, :

-against-

MEMORANDUM
AND
ORDER

N.Y.C. BOARD OF EDUCATION,
ROBERT CHRISTEN, PRESIDENT,

:

Defendants.

:

-x

APPEARANCES:

LEONARD A. FINKEL,
Plaintiff pro se

W. BERNARD RICHLAND, ESQ.
Corporation Counsel, City of New York
Attorney for Defendants
By HOWARD M. KATZ, ESQ.

NEAHER, District Judge.

Leonard A. Finkel, suing on behalf of his minor son Richard, age 7, brought this action under 42 U.S.C. §1983 claiming that his son, and other non-public school children residing in the City of New York were the victims of "reverse discrimination" because of the City's discontinuance of school bus transportation for those attending non-public schools

located outside the school district in which they resided.

The matter is now before the court on the plaintiff's application for a preliminary injunction directing the City's Board of Education to resume inter-borough school bussing on the same routes as existed until the last day of school in June of this year. Defendants, in the brief period of time allowed by the return of the order to show cause, have answered the complaint, denying any discrimination because of the instant plaintiff's race or creed, and affirmatively alleging that under §3635 of the New York Education Law, the City (as a school district) is in no way obligated to provide free or reduced fare transportation for pupils attending non-public schools. The answer further alleges that the decision to eliminate such transportation was necessitated by crippling budget cuts in this period of financial crisis for the City.

A hearing on the application was held this date from which it appeared that young Richard, who is of the Jewish faith and resides on Staten Island, may as a practical matter be denied the opportunity to attend a Yeshiva school in Brooklyn when classes resume on September 13, 1976. To get from Richard's home on Staten Island to that school by public

bus transportation requires the use of five buses and consumes about two and one-half hours. A school bus would make the trip in 45 minutes. What is particularly disturbing to Richard's parents, and those similarly situated, is the fact that the City will continue to provide inter-borough bus transportation to black and Hispanic pupils who are in the "open enrollment" program, which enables them to attend public schools outside the districts in which they reside. Plaintiff contends that these students enroll in the distant schools so that they may obtain a better education — which is the very reason why young Richard wishes to attend the Yeshiva school in Brooklyn. There is no comparable non-public school on Staten Island which offers the religious and bi-cultural curriculum that his parents desire. Plaintiff points out, moreover, that the State of New York will reimburse the City for 90% of the cost of continued inter-borough bus transportation, so that the fiscal argument is of little weight.

Plaintiff undoubtedly has the right to direct the education and religious upbringing of his child by having him attend a non-public religious school. And that right is certainly protected by the Constitution from official abridg-

ment, as recognized in Pierce v. The Society of Sisters, 268 U.S. 510 (1925), and Wisconsin v. Yoder, 406 U.S. 205 (1972). This does not mean, of course, that "there is a right to education explicitly or implicitly guaranteed by the Constitution." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 34-35 (1973). Accordingly, this court would not be warranted in applying a more strict standard of review of the Board of Education's action than the traditional standard which "requires only that the State's system be shown to bear some rational relationship to legitimate State purposes." Id. at 40.

Applying those principles here, it cannot be said that plaintiff has presented either a fair ground for litigation or made a clear showing that there is a likelihood of success and irreparable injury. While undoubtedly there may be some hardship upon young Richard's parents, if they are to carry out their plan to have him attend the Yeshiva school in Brooklyn, it cannot be said that the reduction in services brought about by the City's present financial crisis constitutes an interference with fundamental rights of the plaintiff or those similarly situated. Nor can it be said at this juncture that the "open enrollment" exception to the discontinuance of

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United States Court of Appeals
Second Circuit

Richard Finkel/Minor
Leonard Finkel/Parent

7675/04

Vs.

N.Y.C. Board of Education
Robert Christen, Pres.

State of New York)
County of Richmond)

Leonard A. Finkel does hereby affirm that I have
sent a true copy of the appeal brief to the defendants.

Mailed at the G.P.O. Staten Island NY 10314

Submitted by Leonard A. Finkel
Leonard A. Finkel

December 15, 1976